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Kerry L. Macintosh

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# WHEN ARE MERGER CLAUSES UNCONSCIONABLE?

BY KERRY L. MACINTOSH\*

## INTRODUCTION

Imagine the following scenario: buyer, a typical consumer wishing to obtain goods or services, visits seller. Anxious to close the deal, seller impresses buyer with oral representations and promises concerning the goods or services. Buyer, enticed into making the purchase, signs a preprinted form contract, failing either to notice or understand this deceptively harmless looking provision: "This writing is the final and entire agreement of the parties and there are no other representations, promises, warranties or agreements of any kind." Buyer later discovers that the goods or services do not live up to seller's representations and promises. Angry, buyer sues seller for breach of express warranty or contract. Will buyer win?

The answer lies in the parol evidence rule, a substantive doctrine<sup>1</sup> included in both the common law of contracts and Article Two of the Uniform Commercial Code (U.C.C. or Code).<sup>2</sup> The parol evidence rule gives legal effect to any intention the contracting parties may have to make a writing the final and perhaps complete expression of their agreement.<sup>3</sup> A writing intended as a final expression of one or more terms of an agreement is an integrated agreement.<sup>4</sup> If adopted as a complete and exclusive statement of the agreement, the writing is a completely integrated agreement;<sup>5</sup> otherwise, it is a partially integrated agreement.<sup>6</sup> Under the parol evidence rule, evidence of prior or contemporaneous agreements or negotiations is not admissible to contradict a term of an

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\* Associate Professor of Law, University of Colorado at Boulder School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University.

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1. The term "parol evidence rule" is a misnomer. The rule does not exclude certain facts because they are undesirable or untrustworthy means of proof. Instead, it declares that certain facts are legally ineffective, so that they may not be proven at all. Thus, the parol evidence rule is not a rule of evidence but a rule of substantive law. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2400, at 4 (Chadbourn rev. 1981).

2. See RESTATEMENT (SECOND) OF CONTRACTS §§ 209-18 (1979); U.C.C. § 2-202 (1978).

3. E. FARNSWORTH, CONTRACTS § 7.3, at 451 (1982).

4. RESTATEMENT (SECOND) OF CONTRACTS § 209(1) (1979).

5. *Id.* § 210(1).

6. *Id.* § 210(2).

integrated agreement.<sup>7</sup> Further, evidence of consistent additional terms is inadmissible to supplement a completely integrated agreement.<sup>8</sup>

The parol evidence rule takes on special significance where the writing includes a merger or integration clause. Essentially, a merger clause expressly provides that the writing constitutes the entire agreement between the parties, and that any prior or contemporaneous agreements, representations, or warranties are excluded.<sup>9</sup> Since complete integration depends on the parties' intention, most courts view merger clauses as conclusive evidence that the agreement is completely integrated.<sup>10</sup>

Armed with this knowledge, consider once again the opening hypothetical scenario. As part of the offer, seller's oral representations and promises would ordinarily become terms of the contract.<sup>11</sup> If the sale is of goods, so that Article Two of the U.C.C. applies,<sup>12</sup> the oral representations and promises might even create express warranties<sup>13</sup> which could not be disclaimed.<sup>14</sup> Nevertheless, because this harmless looking

7. *Id.* § 215. The Code's version of the parol evidence rule applies to "evidence of any prior agreement or of a contemporaneous oral agreement." U.C.C. § 2-202 (1978).

The parol evidence rule does not apply to subsequent agreements. An integration may, therefore, be contradicted by evidence which shows its subsequent modification. 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 631, at 950-51 (3d ed. 1961).

8. RESTATEMENT (SECOND) OF CONTRACTS § 216(1) (1979); U.C.C. § 2-202(b) (1978).

9. Comment, *The "Merger Clause" and the Parol Evidence Rule*, 27 TEX. L. REV. 361 (1949).

10. E. FARNSWORTH, *supra* note 3, § 7.3, at 458. *But see, e.g.,* ARB, Inc. v. E-Systems, Inc., 663 F.2d 189, 198-99 (D.C. Cir. 1980); Enrico Farms, Inc. v. H.J. Heinz Co., 629 F.2d 1304, 1306 (9th Cir. 1980) (dictum); Anderson & Nafziger v. G.T. Newcomb, Inc., 100 Idaho 175, 180, 595 P.2d 709, 714 (1979); Shoreham Developers, Inc. v. Randolph Hills, Inc., 248 Md. 267, 272, 235 A.2d 735, 739 (1967).

The Second Restatement commentary states that a merger clause "if agreed to is likely to conclude the issue whether the agreement is completely integrated." RESTATEMENT (SECOND) OF CONTRACTS § 216 comment e (1979). However, "such a clause does not control the question whether the writing was assented to as an integrated agreement, the scope of the writing if completely integrated, or the interpretation of the written terms." *Id.*

11. See 1 A. CORBIN, CORBIN ON CONTRACTS § 11, at 23 (1963).

12. U.C.C. § 2-102 (1978).

13. When a seller makes an affirmation of fact or promise to a buyer which relates to the goods and becomes part of the basis of the bargain, an express warranty that the goods shall conform to the affirmation or promise is created. *Id.* at § 2-313(1)(a). Applying this test to the facts of the opening hypothetical, it appears that seller's representations and promises concerning the goods may be promises or affirmations of fact relating to the goods. Because these promises or affirmations of fact enticed buyer into making the purchase, they are probably part of the basis of the bargain. Thus, express warranties that the goods conform to seller's representations and promises might arise.

14. See Comment, *Contracts - Warranties, Unconscionability, and the Parol Evidence Rule - Industralease Automated & Scientific Corp. v. R.M.E. Enterprises, Inc.*, 27 BUFFALO L. REV. 521, 525 (1978). That an express warranty may not be disclaimed follows from U.C.C. § 2-316(1) (1978), which provides:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Because an express warranty and a disclaimer of express warranty are necessarily inconsistent with each other, § 2-316(1) does, in effect, prohibit the disclaimer by making it inoperative. However, this prohibition is less complete than it might seem, because it is subject to the parol evidence rule. If an express warranty were oral, and the written con-

provision is a merger clause, the writing may very well be viewed by a court as a completely integrated agreement. If so, buyer's evidence proving the oral representations and promises as consistent additional terms will be excluded,<sup>15</sup> causing buyer to lose his lawsuit for breach of express warranty or contract.<sup>16</sup>

This outcome is not inevitable. Several commentators have suggested, without elaboration, that a merger clause may, under the proper circumstances, be invalidated for unconscionability.<sup>17</sup> If the merger clause were so invalidated, buyer would have the chance to establish that the preprinted form contract was only a partially integrated agreement,<sup>18</sup> which could be supplemented by buyer's evidence of consistent additional terms.<sup>19</sup>

Modern unconscionability doctrine is embodied in section 2-302 of the U.C.C., which provides:

- (1) If the court as a matter of law finds the contract or any

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tract included a disclaimer of express warranty, then, assuming the written contract were found to be the final expression of the agreement, the parol evidence rule would exclude evidence of the contradictory oral express warranty. 2 W. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 2-316:06, at 389 (1982); Hester, *Deceptive Sales Practices and Form Contracts - Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831, 852.

15. See *supra* note 8 and accompanying text.

16. Depending on the facts he can prove and his jurisdiction, causes of action not based on breach of contract or express warranty may still be available to buyer. For example, the merger clause would not eliminate evidence of implied warranties. This is because the parol evidence rule has no application to implied warranties, which arise by operation of law rather than by conduct of the parties. Moyer, *Exclusion and Modification of Warranty Under the U.C.C. - How to Succeed in Business Without Really Trying*, 46 DEN. L.J. 579, 606 (1969). Moreover, the parol evidence rule does not generally preclude the use of extrinsic evidence to show fraud. 3 A. CORBIN, *supra* note 11, § 580, at 431; Annotation, *Application of Parol Evidence Rule of UCC § 2-202 Where Fraud or Misrepresentation Is Claimed in Sale of Goods*, 71 A.L.R. 3d 1059, 1060 (1976). Such evidence is ordinarily admissible even in the face of a merger clause. 3 A. CORBIN, *supra* note 11, § 578, at 405-07.

17. See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 2-12, at 93 (2d ed. 1980); Axelrod, *Application of U.C.C. 2-202 - The Integrated Agreement*, 12 CAP. U.L. REV. 1, 14 (1982); Hester, *supra* note 14, at 855.

Professors White and Summers have catalogued other strategies for defeating a merger clause. For example, counsel could argue that the clause should be narrowly construed, or could challenge the clause as the product of duress, bad faith, or mistake requiring judicial reformation of the contract. See J. WHITE & R. SUMMERS, *supra*, § 2-12, at 92-95. An analysis of these alternative strategies is beyond the scope of this article.

18. According to the Second Restatement, any relevant evidence may be used to prove that a writing is or is not a complete integration. RESTATEMENT (SECOND) OF CONTRACTS § 210 comment b (1979); see also *id.* § 214(b) (making even prior or contemporaneous agreements and negotiations admissible to establish whether agreement is completely or partially integrated). This is because "a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." *Id.* § 210 comment b. This approach is in sharp contrast with the earlier view that if a writing appeared on its face to be a complete and exclusive statement of the terms of the agreement, it was a complete integration. See, e.g., *Gianni v. R. Russel & Co.*, 281 Pa. 320, 323, 126 A. 791, 792 (1924).

The U.C.C. does not designate any particular test for determining whether a writing is a complete integration. See U.C.C. § 2-202 (1978). However, any assumption that an integration is a complete integration is rejected. *Id.* comment 1. Evidence of consistent additional terms must be excluded when the terms are such that, if agreed upon, would certainly have been included in the writing. *Id.* comment 3.

19. RESTATEMENT (SECOND) OF CONTRACTS § 216(1) (1979); U.C.C. § 2-202(b) (1978).

clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.<sup>20</sup>

Although section 2-302 is strictly applicable only to sales of goods falling within the purview of Article Two of the U.C.C., it has been applied by analogy to cases not governed by Article Two,<sup>21</sup> and has been incorporated into the common law of contracts by the Second Restatement of Contracts (Second Restatement).<sup>22</sup>

It is the task of this article to explore more deeply the possibility that a merger clause could be held unconscionable, thereby preserving evidence of consistent additional express warranty or contract terms which otherwise would be excluded under the parol evidence rule. This article will first apply the fundamental principles of the modern unconscionability doctrine to determine whether a merger clause may ever be unconscionable, and, if so, under what circumstances. It will then analyze four cases discussing the unconscionability of merger clauses.<sup>23</sup> As

20. U.C.C. § 2-302 (1978).

21. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

22. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979), which provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

The idea of refusing to enforce unconscionable contracts originated with neither the U.C.C. nor the Second Restatement. Equity courts had long refused to grant specific enforcement of unconscionable contracts. See Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115 U. PA. L. REV. 485, 528-33 (1967). Whether equity cases may be used as a guide to the meaning of unconscionability in U.C.C. § 2-302 has been disputed. Compare Leff, *supra*, at 533 (equity cases not helpful) with Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 35-41 (1981) (equity cases helpful).

23. Two cases which purport to address the unconscionability of a merger clause, *LeDonne v. Kessler*, 256 Pa. Super. 280, 389 A.2d 1123 (1978), and *Agristor Credit Corp. v. Schmidlin*, 601 F. Supp. 1307 (D. Or. 1985), will not be fully analyzed in this article, for the following reasons. First, it is doubtful whether a true merger clause was at issue in *LeDonne*. There, paragraph six of the contract was referred to as an "integration clause." Paragraph six provided: "The parties have full knowledge of the physical appearance of the land and buildings and of the value thereof and there are no verbal representations as to character or quality." *LeDonne v. Kessler*, 256 Pa. Super. 280, 285, 389 A.2d 1123, 1126 (1978). This term is too narrow to qualify as a recital of complete integration. Rather than declaring all extrinsic representations, promises, and agreements to be without effect, it disclaims only verbal representations regarding the character or quality of the real property to be sold. Moreover, the *LeDonne* court limited the term's effect still further by interpreting it as a denial of representations regarding reasonably apparent, but not hidden, conditions. *LeDonne*, 256 Pa. Super. at 291, 389 A.2d at 1129.

Second, as already noted, the focus of this article is on the use of the unconscionability doctrine to invalidate the merger clause where it would otherwise exclude evidence of consistent additional express warranty or contract terms under the parol evidence rule. *LeDonne* and *Agristor* are not relevant to this focus. Neither case involves any attempt to

a prelude, it is first necessary to give some background on the unconscionability doctrine itself.

### I. MODERN UNCONSCIONABILITY DOCTRINE

Certain aspects of modern unconscionability doctrine are well defined. The decision as to whether a contract or clause is unconscionable is one of law to be made by the court.<sup>24</sup> In making this decision, the court must assess the contract or clause as of the time it was made.<sup>25</sup> Also, in determining unconscionability, the court must judge the challenged contract or clause in light of its commercial setting, purpose and effect.<sup>26</sup> Once it finds a contract or clause to be unconscionable, the court has several options available to it. It may refuse to enforce the contract, enforce the contract without the unconscionable clause, or limit the application of any unconscionable clause so as to avoid any unconscionable result.<sup>27</sup>

The meaning of the term "unconscionable" is not defined in either the Code or the Second Restatement.<sup>28</sup> The commentary to U.C.C. section 2-302 provides only limited assistance:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.<sup>29</sup>

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argue that, under the parol evidence rule, a merger clause excluded evidence of consistent additional contract or express warranty terms. Rather, in each case, a merger clause, or at least a term denominated as such, was asserted in an effort to defeat a cause of action for fraud. In *LeDonne*, the court held that the parol evidence rule barred testimony of alleged fraudulent misrepresentations concerning water leakage which contradicted the terms of the supposed "integration clause." *LeDonne*, 256 Pa. Super. at 292, 389 A.2d at 1129-30. In *Agristor*, the merger clause stated in part: "I rely on no other promises or conditions and regard that as reasonable because these are acceptable to me." *Agristor Credit Corp. v. Schmidlin*, 601 F. Supp. 1307, 1313 (D. Or. 1985). An Oregon statute provided that the truth of facts recited in the written instrument could not be denied by the parties. In light of this statute, the *Agristor* court held that the merger clause established a conclusive presumption that there was no reliance on alleged fraudulent misrepresentations. *Id.* (citing OR. REV. STAT. § 42.300 (1981)).

24. U.C.C. § 2-302(1) (1978); RESTATEMENT (SECOND) OF CONTRACTS § 208 comment f (1979).

25. U.C.C. § 2-302(1) (1978); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979). Thus, it has been held that an unexpected price increase subsequent to contracting which makes performance of contract obligations onerous will not support a finding of unconscionability. *See, e.g., Kerr-McGee Corp. v. Northern Util., Inc.*, 673 F.2d 323 (10th Cir.), *cert. denied*, 459 U.S. 989 (1982); *Bradford v. Plains Cotton Coop. Ass'n*, 539 F.2d 1249 (10th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *J.L. McEntire & Sons, Inc. v. Hart Cotton Co.*, 256 Ark. 937, 511 S.W.2d 179 (1974).

26. U.C.C. § 2-302(2) (1978); RESTATEMENT (SECOND) OF CONTRACTS § 208 comment f (1979).

27. U.C.C. § 2-302(1) (1978); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

28. *See* U.C.C. § 2-302 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

29. U.C.C. § 2-302 comment 1 (1978) (citation omitted).

Legal scholars have done their best to bridge this definitional gap.<sup>30</sup> In his influential article, Professor Leff suggests that there are two basic types of unconscionability: procedural unconscionability, which has to do with misbehavior during the contracting process, and substantive unconscionability, which has to do with evils in the resulting contract itself.<sup>31</sup>

The Code commentary leads another author, Professor Spanogle, to believe that procedural abuses are of two types: oppression, implying compulsion resulting from a lack of opportunity to "codetermine" terms, and unfair surprise, implying deception by artifice.<sup>32</sup> In his view, oppression entails more than mere duress; oppression encompasses adhesion contracts, which allow one party to choose whether to contract but not what the terms of the contract will be.<sup>33</sup> Unfair surprise results from a variety of deceptive sales practices, including the use of fine print to hide a clause, or the use of language incomprehensible to a layperson.<sup>34</sup>

Professor Spanogle further deduces that these procedural abuses will render a term unconscionable only when coupled with substantive abuses.<sup>35</sup> He proposes adopting a sliding scale approach, so that the more procedural unconscionability is present, the less substantive unconscionability is required, and vice versa.<sup>36</sup> Moreover, he argues, different substantive standards are applicable in situations involving different procedural abuses in forming the contract.<sup>37</sup> An oppressive, nonbargained term is substantively suspect if it alters or impairs the fair meaning of the bargained-for terms, or is "manifestly unreasonable."<sup>38</sup> The concept of manifest unreasonableness is based upon a weighing of any legitimate commercial interest served by the nonbargained term against any identifiable public policies offended by the term.<sup>39</sup> These

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30. See e.g., Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970); Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Hillman, *supra* note 22; Leff, *supra* note 22; Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Speidel, *Unconscionability, Assent & Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

31. Leff, *supra* note 22, at 487.

32. Spanogle, *supra* note 30, at 943.

33. *Id.* at 944.

34. *Id.* at 943.

35. *Id.* Professor Spanogle reasons that the commentary's indication that unfair surprise is to be prevented suggests "not only that there must be abuses in forming the contract, but also that such abuses have allowed the drafting party to take unfair advantage of the non-drafting party." *Id.* Similarly, impermissible oppression can be distinguished from permissible allocation of risks because of superior bargaining power by looking beyond the procedural abuse of nonbargaining to the difference between reasonable and unreasonable resultant contract terms. *Id.* at 944.

36. *Id.* at 952.

37. *Id.* at 947.

38. *Id.* at 945.

39. *Id.* at 958. Terms offensive to public policy include not only those terms actually prohibited, but also those disfavored by public policy. *Id.* at 960. Note that under the

two standards are objective, for they depend on the court's view of the term's fairness.<sup>40</sup> On the other hand, where the procedural abuse is unfair surprise, a term is subject to substantive abuse if it violates the surprised party's reasonable expectations.<sup>41</sup> Such a violation might occur if the party who drafted the contract deliberately creates expectations in the surprised party which are contrary to the terms of the contract.<sup>42</sup> This shift in emphasis from the court's view of the term's fairness to the surprised party's reaction to the term is justified by the need to afford additional protection where unfair surprise is involved.<sup>43</sup>

Having determined that no procedural abuse is sufficient to render a term unconscionable absent a substantive abuse, Professor Spanogle also discusses the converse question: Could a substantive abuse alone render a term unconscionable? He concedes that the word "oppression" could refer to terms having an oppressive effect, so that procedural abuses would be irrelevant.<sup>44</sup> Since a review of pre-Code unconscionability cases indicates that an especially harsh term could by itself constitute unconscionability, Professor Spanogle concludes that a limited use of a purely substantive definition of oppression is justifiable.<sup>45</sup>

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sliding scale approach, when a disfavored term is involved, a sufficiently egregious procedural abuse may justify voiding the term. *Id.*

40. *Id.* at 946.

41. *Id.* at 947-48. Professor Spanogle's theory that an unfairly surprising term is substantively suspect if it violates the reasonable expectations of the surprised party does not appear to be based upon, and thus must be distinguished from, that principle of insurance law which holds that a term of an insurance policy which is inconsistent with the reasonable expectations of the insured will not be enforced. See R. KEETON, *BASIC TEXT ON INSURANCE LAW* 351 (1971). The drafters of the Second Restatement believed that this "expectations principle" was valid with respect to all standardized agreements. Birnbaum, Stahl & West, *Standardized Agreements and the Parol Evidence Rule: Defining and Applying the Expectations Principle*, 26 ARIZ. L. REV. 793, 811 (1984). Accordingly, they adopted the following provision:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979). The commentary explains that "[a]lthough customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation." *Id.* comment f.

The expectations principle is closely related to the unconscionability doctrine. See *id.* An examination of this relationship is, however, beyond the scope of this article. For a lucid analysis of the expectations principle in the Second Restatement, see Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975).

42. Spanogle, *supra* note 30, at 963.

43. *Id.* at 947.

44. *Id.* at 948.

45. *Id.* at 950. As Professor Spanogle points out, one consequence of this theory is



A review of the cases shows them to be consistent with much of Professor Spanogle's analysis. Many of the factors identified by the courts as supporting a finding of unconscionability fit within the two categories of procedural abuse, oppression and unfair surprise. Inequality of bargaining power<sup>46</sup> and the use of a form contract containing non-negotiable terms<sup>47</sup> may indicate oppression resulting from an inability to codetermine the contract terms.<sup>48</sup> On the other hand, lack of education or business sophistication,<sup>49</sup> inability to read English,<sup>50</sup> use of contract language incomprehensible to a layperson,<sup>51</sup> and burying of provisions in fine print or on the reverse side of the contract<sup>52</sup> are all factors suggesting that a challenged term is unfairly surprising to one party, because it is hidden from or incomprehensible to him.<sup>53</sup>

Case law defines substantive abuse broadly, asking whether the challenged term is overly harsh<sup>54</sup> or unreasonably favorable.<sup>55</sup> These

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that grossly excessive price, a form of substantive abuse, might render a contract unconscionable, even in the absence of any procedural abuse. *Id.* at 952.

46. *See, e.g.*, *Martin v. Joseph Harris Co.*, 767 F.2d 296, 301 (6th Cir. 1985); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 488, 186 Cal. Rptr. 114, 122 (1982); *Fischer v. General Elec. Hotpoint*, 108 Misc. 2d 683, 438 N.Y.S.2d 690 (1981).

The doctrine of unconscionability is not intended to disturb allocation of risk due to superior bargaining power. U.C.C. § 2-302 comment 1 (1978); *see* RESTATEMENT (SECOND) OF CONTRACTS § 208 comment d (1979). Thus, superior bargaining power alone may be insufficient to sustain a finding of unconscionability. *See* *Seekings v. Jimmy GMC, Inc.*, 130 Ariz. 596, 602, 638 P.2d 210, 216 (1981).

47. *See, e.g.*, *Bank of Indiana v. Holyfield*, 476 F. Supp. 104, 111 (S.D. Miss. 1979); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 491, 186 Cal. Rptr. 114, 125 (1982). Some courts have declined to hold a nonnegotiable term unconscionable, where the complaining party was under no economic pressure and could have walked away from the deal. *See* *Blalock Mach. & Equip. Co. v. Iowa Mfg. Co.*, 576 F. Supp. 774, 778-79 (N.D. Ga. 1983); *RJM Sales & Mktg. v. Banfi Prod. Corp.*, 546 F. Supp. 1368, 1375 (D. Minn. 1982).

48. *See supra* note 32 and accompanying text.

49. *See* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *Bank of Indiana v. Holyfield*, 476 F. Supp. 104, 111 (S.D. Miss. 1979). Conversely, education or business sophistication may weigh against a finding of unconscionability. *See, e.g.*, *Fotomat Corp. v. Chanda*, 464 So. 2d 626, 631 (Fla. Dist. Ct. App. 1985); *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 308-09, 263 A.2d 390, 393 (1970).

50. *See, e.g.*, *Brooklyn Union Gas Co. v. Jimenez*, 82 Misc. 2d 948, 951, 371 N.Y.S.2d 289, 291 (1975); *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 141, 302 N.Y.S.2d 390, 393 (1969).

51. *See* *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 759, 549 P.2d 903, 907 (1976); *see also* *Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 575 (8th Cir. 1975) (whether complaining party understood challenged term is a relevant consideration); *Fischer v. General Elec. Hotpoint*, 108 Misc. 2d 683, 684, 438 N.Y.S.2d 690, 691 (1981) (same).

52. *See, e.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 490, 186 Cal. Rptr. 114, 124 (1982); *Capital Assoc. v. Hudgens*, 455 So. 2d 651, 654 (Fla. Dist. Ct. App. 1984); *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169, 179 (Iowa 1975); *Bogatz v. Case Catering Corp.*, 86 Misc. 2d 1052, 1056, 383 N.Y.S.2d 535, 538 (1976).

53. *See supra* note 34 and accompanying text.

54. *See* *Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 951 (Ind. App. 1982); *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. 1979); *Schroeder v. Pageol Motors, Inc.*, 86 Wash. 2d 256, 260, 544 P.2d 20, 23 (1975).

55. *See, e.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *Blalock Mach. & Equip. Co. v. Iowa Mfg. Co.*, 576 F. Supp. 774, 778 (N.D. Ga. 1983); *RJM Sales & Mktg. v. Banfi Prod. Corp.*, 546 F. Supp. 1368, 1375 (D. Minn. 1982).

definitions are sufficiently general to encompass the more specific substantive standards proposed by Professor Spanogle: impairment of bargained-for terms, manifest unreasonableness, and violation of reasonable expectations.

As Professor Spanogle suggests, both procedural and substantive abuses are generally required to render a term unconscionable.<sup>56</sup> His sliding scale approach to the determination of unconscionability has also been well received.<sup>57</sup> Finally, Professor Spanogle's conclusion that a severe substantive abuse alone can render a term unconscionable is reinforced by the commentary to the Second Restatement. The Second Restatement states that some types of terms are not enforced, regardless of context, and illustrates this principle with examples of unreasonably large liquidated damages provisions and limitations on a debtor's right to redeem collateral.<sup>58</sup>

## II. UNCONSCIONABILITY DOCTRINE APPLIED TO THE MERGER CLAUSE

Can a merger clause be unconscionable? In an effort to answer this question, the foregoing principles will be applied to the hypothetical scenario set forth at the beginning of this article.

A merger clause, like any other clause, may be subject to the procedural abuses of oppression and unfair surprise. In the hypothetical scenario, buyer signs a preprinted form contract prepared by seller. Very probably the contract's terms are nonnegotiable. Thus the procedural abuse of oppression is almost certainly present.<sup>59</sup> Since buyer is a typical consumer, he may well lack business sophistication, or possibly even a decent education. If he does not notice the merger clause, it may be buried in fine print or located in a place that is easy to miss. If he does not understand the meaning of the clause, perhaps it is written in language incomprehensible to a layperson.<sup>60</sup> Accordingly, the procedural

56. *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 487, 186 Cal. Rptr. 114, 122 (1982); *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. 1979); *see, e.g., Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 575-76 (8th Cir. 1975); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *Blalock Mach. & Equip. Co. v. Iowa Mfg. Co.*, 576 F. Supp. 774, 778 (N.D. Ga. 1983); *Leasing Service Corp. v. Broetje*, 545 F. Supp. 362, 366 (S.D.N.Y. 1982); *Bank of Indiana v. Holyfield*, 476 F. Supp. 104, 109 (S.D. Miss. 1979).

57. *See A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 487, 186 Cal. Rptr. 114, 122 (1982); *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. 1979).

58. RESTATEMENT (SECOND) OF CONTRACTS § 208 comment e (1979). In theory, the substantive abuse of grossly excessive price might be sufficient to render a contract unconscionable. *See supra* note 45. Some cases have held contracts unconscionable on the basis of grossly excessive price. However, they arguably involved procedural abuses as well. *See Spanogle, supra* note 30, at 964-67.

59. *See supra* note 47 and accompanying text.

60. Indeed, it would be a rare merger clause which would be comprehensible to a layperson in any meaningful sense, given that laypeople are not generally aware of the effect such a clause will have under the parol evidence rule. The following language has been suggested in substitution of the traditional merger clause: "Write anything anyone said about this sale which was important to you in the space that follows. Understand this: *If you haven't got it in writing, you haven't got it.*" A. CORBIN, *supra* note 11, § 578, at 645 (Supp. 1984) (emphasis in original). This language is so clear that it seems unlikely a

abuse of unfair surprise is probably present also.<sup>61</sup>

The next step is to review the transaction for substantive abuse. Since the procedural abuse of oppression is probably involved, the merger clause will be unconscionable if it is manifestly unreasonable or if it alters or impairs the fair meaning of the bargained-for terms.<sup>62</sup> An argument that the clause is manifestly unreasonable would be difficult to construct. Manifest unreasonableness is determined by weighing any public policies offended by a term against legitimate commercial needs or purposes served by that term.<sup>63</sup> There appear to be no identifiable public policies offended by merger clauses in general. On the contrary, the very existence of the parol evidence rule, a substantive doctrine designed to enforce the parties' intent to make a writing the complete and final expression of their agreement,<sup>64</sup> evidences the legitimacy of merger clauses, which are no more than declarations of such intent. Moreover, merger clauses serve many legitimate commercial purposes. For example, parties to a contract may have engaged in lengthy negotiations, with several proposals made and rejected. The parties may insert a merger clause to protect the integrity of the final agreement against attempts to resurrect a superseded proposal.<sup>65</sup> Also, a principal may find inclusion of a merger clause to be helpful in protecting himself against the overenthusiastic, unauthorized representations of his agent.<sup>66</sup> Finally, merger clauses serve the legitimate purpose of guarding against false allegations of consistent additional terms.<sup>67</sup> Thus, even if this merger clause were offensive to public policy, its tendency to further a legitimate commercial purpose could render it manifestly reasonable.

That this merger clause alters or impairs the fair meaning of the bargained-for terms seems a more likely conclusion. Seller makes oral representations and promises in an attempt to induce a sale of goods or services and increase his profits. He succeeds. Buyer, enticed by those representations and promises, decides to make the purchase. Seller's representations and promises will ordinarily become express warranties or contract terms. However, the preprinted form contract includes a merger clause. As a recital of complete integration, the merger clause has the effect under the parol evidence rule of excluding evidence of these consistent additional terms.<sup>68</sup> By so doing, the clause impairs these bargained-for terms.

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seller would be willing to use it for fear of awakening the buyer to the fact that the sales pitch meant nothing.

61. See *supra* notes 49, 51, and 52 and accompanying text.

62. See *supra* note 38 and accompanying text.

63. See *supra* note 39 and accompanying text.

64. See *supra* note 3 and accompanying text.

65. J. WHITE & R. SUMMERS, *supra* note 17, § 2-12, at 90.

66. *Id.* at 91.

67. See *id.* § 12-4, at 437; see also U.C.C. § 2-316 comment 2 (1978) (parol evidence rule provides protection against false allegations of oral warranties). Of course, since the parol evidence rule does not apply to subsequent agreements, the protection against perjury afforded by the merger clause is less than total. See *supra* note 7.

68. See text accompanying note 15 *supra*.

Professor Spanogle analogizes this prohibition of the alteration or impairment of bargained-for terms to U.C.C. section 2-316(1),<sup>69</sup> which prohibits the disclaimer of express warranties.<sup>70</sup> To the extent this merger clause prevents buyer from proving oral express warranties made by seller, it has the same effect as a disclaimer of express warranties.

Because the procedural abuse of unfair surprise is probably also involved in this transaction, the merger clause will be unconscionable if it violates buyer's reasonable expectations under the contract.<sup>71</sup> Seller, through his representations and promises, deliberately creates an expectation in buyer that he enjoys the benefit of additional contract or express warranty terms. By excluding evidence of these consistent additional terms, the merger clause contradicts this expectation.<sup>72</sup> Since the merger clause is contrary to an expectation seller deliberately created in buyer, buyer's reasonable expectations are frustrated by the clause.<sup>73</sup>

Thus, application of the unconscionability doctrine to the hypothetical scenario demonstrates that a merger clause may indeed be unconscionable. In fact, the hypothetical scenario is a perfect vehicle to illustrate the merger clause's potential for unconscionability, since it involves both procedural and substantive abuses, as are generally required to render a term unconscionable.<sup>74</sup> Yet, it has been suggested that particularly harsh terms may be unconscionable even in the absence of procedural abuses.<sup>75</sup> Some terms are so offensive to public policy or a sense of decency that they will be considered unconscionable and unenforceable, even though the parties willingly and knowingly assented to their inclusion in the contract. Could a merger clause which is freely bargained for and understood by both parties ever be so offensive to public policy as to be unconscionable? The answer appears to be no. Although a merger clause may exclude evidence of consistent additional terms which would have conferred valuable legal rights upon one of the parties, whatever harshness may result is impliedly sanctioned by the law, which, in the form of the parol evidence rule, enforces the merger clause's declaration of complete integration.<sup>76</sup> Accordingly, the follow-

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69. See Spanogle, *supra* note 30, at 946.

70. See *supra* note 14 and accompanying text.

71. See *supra* note 41 and accompanying text.

72. See text accompanying note 15 *supra*.

73. See *supra* note 42 and accompanying text.

74. See *supra* note 56 and accompanying text.

75. See *supra* notes 45 and 58 and accompanying text.

76. See text accompanying note 64 *supra*. Of course, the decision that the merger clause itself is not unconscionable in the absence of procedural abuses does not preclude a determination that other forms of purely substantive unconscionability are present. For example, the possibility that grossly excessive price is an independent basis for finding unconscionability, even in the absence of any procedural abuse, has been noted. See *supra* notes 45 and 58. Where a merger clause is applied to eliminate terms conferring valuable legal rights, the price charged for the remaining rights may turn out to be grossly excessive, and, therefore, unconscionable. Cf. 2 W. HAWKLAND, *supra* note 14, § 2-302:04, at 171 (excessive price is the true basis for a determination that a disclaimer is unconscionable).

ing analysis of the cases addressing the unconscionability of a merger clause will proceed on the assumption that both procedural and substantive abuses must be shown before a merger clause may be held unconscionable.

### III. ANALYSIS OF CASES ADDRESSING THE UNCONSCIONABILITY OF A MERGER CLAUSE

Four cases address the unconscionability of a merger clause asserted under the parol evidence rule as an impediment to proof of consistent additional contract or express warranty terms.<sup>77</sup>

#### A. *Seibel v. Layne & Bowler, Inc.*

*Seibel v. Layne & Bowler, Inc.*<sup>78</sup> provides the most detailed analysis in support of a holding that a merger clause is unconscionable. There, plaintiffs purchased a water pump for their farm from defendant. When the pump failed to function, plaintiffs sued for breach of various express oral warranties allegedly made by defendant in agreeing to install the pump. Defendant argued that the written contract, which contained a merger clause, was intended to be the complete and exclusive expression of the parties' agreement, which could not be supplemented by the express oral warranties under the parol evidence rule.<sup>79</sup>

The Oregon Court of Appeals disagreed, attacking the merger clause on two grounds. First, the court noted, supplemental terms were barred by the parol evidence rule only if both parties intended the writing as a complete expression of their agreement. Since the merger clause was inconspicuous, it provided "little or no evidence of the parties' intentions, regardless of the defendant's intentions."<sup>80</sup> Second, the court observed, under U.C.C. section 2-302, courts were to limit the application of contract provisions so as to avoid any unconscionable result. Citing the comments to section 2-302, the court stated that one princi-

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77. The cases are: *Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146 (5th Cir. 1979); *Smith v. Central Soya, Inc.*, 604 F. Supp. 518 (E.D.N.C. 1985); *Seibel v. Layne & Bowler, Inc.*, 56 Or. App. 387, 641 P.2d 668 (1982); *Butcher v. Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P.2d 1352 (1978), *petition for review denied*, 91 Wash. 2d 1004 (1978).

78. 56 Or. App. 387, 641 P.2d 668 (1982).

79. *Id.* at 391, 641 P.2d at 671.

80. *Id.* The *Seibel* court offered no explanation as to why the merger clause's inconspicuousness should render it a poor indicator of the parties' intentions. A suggestion follows. Under the objective theory of contracts, a party is bound by the impression he reasonably creates. This principle has given rise to the "duty to read" rule, providing that a party who signs an instrument manifests assent, even if he did not read or understand it. Calamari, *Duty to Read - A Changing Concept*, 43 *FORDHAM L. REV.* 341 (1974). Nevertheless, under traditional exceptions to the duty to read rule, a party is not bound by provisions which are written illegibly, hidden in fine print, or placed in such a way that they are not likely to come to his attention. *Id.* at 343. Accordingly, the plaintiffs in *Seibel*, despite having entered into the written contract, arguably did not manifest their objective assent to the merger clause, which was buried in fine print, and were not bound by its recital of complete integration.

ple underlying unconscionability was the prevention of unfair surprise. It concluded:

We think that it would be unconscionable to permit an inconspicuous merger clause to exclude evidence of an express oral warranty—especially in light of the policy expressed by ORS 72.3160. That is, a disclaimer of the implied warranties of fitness and merchantability must be conspicuous to prevent surprise. We think that a merger clause which would deny effect to an express warranty must be conspicuous to prevent an even greater surprise.<sup>81</sup>

The *Seibel* court provided no independent explanation of why the merger clause was inconspicuous. However, it did state that the merger clause was as inconspicuous as the written contract's disclaimer of all express and implied warranties.<sup>82</sup> Presumably the merger clause suffered from the same inadequacies as the disclaimer, which was hidden in text which was printed in small type, in long and closely spaced lines, and without indentation or extra spacing between paragraphs.<sup>83</sup>

Having struck down the merger clause, the court was quick to add a placatory footnote:

We recognize that a merger clause is appropriate where a seller wishes to protect himself from his over-enthusiastic salesman's unauthorized oral representations (and from a fabricated oral representation). But unless the buyer is informed that the seller is disavowing those representations, the seller cannot expect protection from his agent's errors.<sup>84</sup>

The *Seibel* court's decision that the merger clause was unconscionable was founded squarely on the clause's inconspicuousness. Inconspicuousness, as the court itself suggested, is an indicator of the procedural abuse of unfair surprise.<sup>85</sup> But, the unconscionability doctrine generally requires the presence of both substantive and procedural unconscionability before a clause may be struck down.<sup>86</sup> There was no direct discussion in the *Seibel* opinion of the merger clause's substantive unconscionability. The court did see fit, however, to state that a merger clause was an appropriate protection against unauthorized or fabricated representations. This statement supports the view that a merger clause is not subject to the substantive abuse of manifest unreasonableness where it serves these legitimate commercial purposes.<sup>87</sup>

To complete the analysis which the *Seibel* court left unfinished, it is necessary to apply the substantive standard corresponding to the proce-

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81. *Seibel*, 56 Or. App. at 391-92, 641 P.2d at 671.

82. *Id.* at 391, 641 P.2d at 671. In an earlier section of its opinion, the *Seibel* court invalidated this disclaimer for failure to conform to U.C.C. § 2-316(2), requiring that a disclaimer of implied warranties be conspicuous. *Seibel*, 56 Or. App. at 391, 641 P.2d at 670.

83. *Seibel*, 56 Or. App. at 391, 641 P.2d at 670.

84. *Id.* at 392 n.1, 641 P.2d at 671 n.1.

85. See *supra* note 52 and accompanying text.

86. See *supra* note 56 and accompanying text.

87. See *supra* notes 66-67 and accompanying text.

dural abuse of unfair surprise, that is, whether the challenged term defeats the surprised party's reasonable expectations.<sup>88</sup> Here, the merger clause would have excluded evidence of express oral warranties made by defendant to plaintiffs. An express warranty is, by definition, a guarantee that the goods will conform to an affirmation of fact or promise concerning the goods, any description of the goods, or any sample or model which becomes or is made part of the basis of the bargain.<sup>89</sup> In other words, an express warranty seeks to enforce expectations concerning the goods which seller deliberately induced in buyer. The merger clause in *Seibel* would have effectively eliminated defendant's express warranties, thereby foiling plaintiffs' reasonable expectations. Therefore, it appears that the *Seibel* court's conclusion, that the merger clause was unconscionable, was justified on both procedural and substantive grounds.

B. *Smith v. Central Soya, Inc.*

In *Smith v. Central Soya, Inc.*,<sup>90</sup> a federal district court applying North Carolina law refused to find a merger clause unconscionable. *Smith* involved a series of written egg production contracts. Under these contracts, plaintiffs were obligated to furnish such housing, equipment, utilities, litter, and labor as was necessary for the proper care and housing of chickens and the eggs they produced. Defendant, Central Soya of Athens, Inc. (Central Soya), promised to supply chickens and pay plaintiffs a monthly sum for their services. Central Soya repeatedly renewed these contracts by supplying plaintiffs with replacement flocks of chickens annually. Ten years after entering into the first egg production contract, Central Soya sold its business to the codefendant, Sun City Industries, Inc. (Sun City), which assumed Central Soya's contractual obligations. Sun City completed performance under the contracts for the current egg production period, but did not supply further replacement chickens at the end of the laying cycle.<sup>91</sup>

Plaintiffs sued, alleging that prior to execution of the written contracts, agents of Central Soya had orally represented that Central Soya would continue to supply replacement chickens so that plaintiffs would have an income for twenty years on their chicken houses. Thus, they contended, Sun City's decision not to supply replacement chickens was a breach of contract.<sup>92</sup>

The primary obstacle to plaintiffs' cause of action for breach of contract was the merger clause in each of the egg production contracts. Pointing out that evidence of prior and contemporaneous negotiations and agreements could not be used to vary, add to, or contradict a total

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88. See *supra* note 41 and accompanying text.

89. See U.C.C. § 2-313(1) (1978).

90. 604 F. Supp. 518 (E.D.N.C. 1985).

91. *Id.* at 521-22.

92. *Id.* at 522-23.

integration,<sup>93</sup> the *Smith* court stated that a merger clause created a presumption of total integration, which could be rebutted only by evidence establishing fraud, bad faith, negligent omission, mistake in fact, or unconscionability.<sup>94</sup> Responding to plaintiffs' argument that the merger clause was unconscionable, the court set forth a two-part test, requiring plaintiffs to "demonstrate that (1) they had no meaningful choice but to deal with the defendants and accept the contract as offered and (2) the merger clause was unreasonably favorable to the defendants."<sup>95</sup>

The court found that neither element of this test was satisfied. First, although the egg production contracts were preprinted standardized contracts prepared by Central Soya, so that the merger clause was nonnegotiable, plaintiffs had a choice because they were not under economic duress and did not have to enter into the contracts. Nor did Central Soya occupy a grossly superior bargaining position. Second, the merger clause was not unreasonably advantageous to defendants. The clause simply granted preclusive effect to the written terms of the contracts and, under other circumstances, could as easily have benefited plaintiffs as defendants. Finally, the court observed, the evidence indicated that the plaintiffs signed the contracts with a complete understanding of their terms and with knowledge they were to last for one year, not twenty. Therefore, the court held the merger clause was not unconscionable, the contracts were total integrations, and plaintiffs' parol evidence should be excluded.<sup>96</sup> Summary judgment for defendants on the breach of contract claim was granted.<sup>97</sup>

In analyzing the *Smith* case in light of the adopted conceptual framework, it is first necessary to ask whether either of the two types of procedural abuse, unfair surprise or oppression, was present. It seems unlikely that plaintiffs were unfairly surprised; the court emphasized that they had read and completely understood the contract terms, which presumably included the merger clause. However, the egg production contracts were preprinted standardized contracts prepared by Central Soya, making the merger clause nonnegotiable. This refusal to bargain constituted oppression.<sup>98</sup>

By contrast, the *Smith* court made evident its belief that a more severe degree of oppression, that is, one party's refusal to bargain coupled with the other party's inability to choose whether to contract at all, was required before the merger clause could be held unconscionable. Such a narrow view of oppression, though supported by some case law,<sup>99</sup> seems undesirable. It restricts the utility of the unconscionability doctrine as a means of strengthening freedom of contract, which implies not only the ability to choose whether to enter into a contract, but also the

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93. *Id.* at 524 (citing *Rowe v. Rowe*, 305 N.C. 177, 185, 287 S.E.2d. 840, 845 (1982)).

94. *Id.* at 526.

95. *Id.*

96. *Id.* at 527.

97. *Id.* at 528.

98. See *supra* note 47 and accompanying text.

99. See *supra* note 47.



mutual ability to determine the terms of the contract.<sup>100</sup>

Assuming that the procedural abuse of oppression was present, the merger clause must next be examined to determine whether it was manifestly unreasonable, or altered or impaired the fair meaning of the bargained-for terms.<sup>101</sup> There seems little likelihood that the clause was manifestly unreasonable. As already indicated, a merger clause does not offend public policy,<sup>102</sup> and sufficient commercial justification for inclusion of the merger clause in Central Soya's standardized contracts could have been found in Central Soya's need to protect itself against the unauthorized representations of its agents.<sup>103</sup> Moreover, in this particular case, it seems doubtful that the merger clause altered or impaired the fair meaning of the bargained-for terms. As an alternative basis for its grant of summary judgment on the breach of contract claim, the *Smith* court held that the oral representations regarding the continuation of the business relationship for twenty years were at best mere expressions of belief or opinion which created absolutely no contractual obligation.<sup>104</sup> Thus, the merger clause in *Smith* did not impair any bargained-for term, because the evidence excluded by the clause was itself legally insufficient to establish any such term. It follows that there was no substantive abuse justifying a holding that the merger clause was unconscionable.<sup>105</sup>

The *Smith* court appears to have reached the correct conclusion, but for the wrong reasons. In examining whether the merger clause was unreasonably favorable to the defendants, the court was applying a test of substantive unconscionability. It concluded that the merger clause was not unreasonably favorable to the defendants because, under other circumstances, the merger clause might have benefited plaintiffs as easily as defendants. This analysis is unsupportable for two reasons. First, unconscionability doctrine requires a challenged term to be judged in light of the particular facts of the case, not some hypothetical facts.<sup>106</sup> Second, the court's analysis implies that a term which applies equally to both parties cannot be substantively unconscionable. If this standard were adopted, no merger clause or any other even-handed clause<sup>107</sup> could ever be substantively unconscionable. Yet the tendency of the

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100. Spanogle, *supra* note 30, at 935-36.

101. See *supra* note 38 and accompanying text.

102. See text accompanying note 64 *supra*.

103. See *supra* note 66 and accompanying text. That Central Soya did its business through agents can be inferred from plaintiffs' allegation that agents of Central Soya orally represented to them that replacement chickens would be supplied for twenty years. *Smith v. Central Soya, Inc.*, 604 F. Supp. 518, 522 (E.D.N.C. 1985).

104. *Smith*, 604 F. Supp. at 527. *Smith* claimed that Central Soya stated, "[w]e're in the chicken business to stay," and that "the chicken houses will last for twenty years." *Id.*

105. See *supra* note 55 and accompanying text.

106. Spanogle, *supra* note 30, at 937.

107. In *Blalock Mach. & Equip. Co. v. Iowa Mfg. Co.*, 576 F. Supp. 774, 779 (N.D. Ga. 1983), a case cited by the *Smith* court, an unconscionability challenge to a termination clause in a distributorship contract was rejected, at least in part on the rationale that the clause gave either party to the contract the unilateral power to terminate the contract upon 30 days notice.

merger clause to foster such substantive abuses as impairing bargained-for terms or defeating reasonable expectations has already been demonstrated.<sup>108</sup>

C. *Butcher v. Garrett-Enumclaw Co.*

In *Butcher v. Garrett-Enumclaw Co.*,<sup>109</sup> the buyer of a defective portable sawmill sued the seller for breach of express and implied warranties. In support of an argument that no such warranties had been made, the seller offered into evidence a purchase order which included a merger clause and a disclaimer of all express and implied warranties.<sup>110</sup> The trial court excluded the purchase order, and the jury subsequently rendered a verdict for the buyer. The Washington state Court of Appeals agreed with the trial court's ruling that the merger clause was both unreasonable and unconscionable.<sup>111</sup> However, the court did not analyze the clause in traditional unconscionability terms. Instead, it noted that, in one sentence of the purchase order, the subject matter of the sale was referred to as a "motor vehicle."<sup>112</sup> In view of this "outright inaccuracy," the court reasoned, the purchase order was not an integrated contract, and its admission into evidence without excision of the merger clause would, therefore, have constituted prejudicial error.<sup>113</sup>

This reasoning is opaque. To begin with, there seems to be no reason why the parties could not have intended the purchase order as a complete integration, despite the fact that it was apparently a form contract ordinarily used in motor vehicle sales.<sup>114</sup> Further, the *Butcher* court utterly failed to explain why its conclusion that the purchase order was not a complete integration, despite the merger clause, justified its adoption of the trial court's ruling that the merger clause was unconscionable.

Constructing a more appropriate analysis is not an easy task. The *Butcher* opinion did not discuss any facts which would allow a determination of whether the merger clause was affected by the procedural abuse of unfair surprise. That the purchase order inappropriately referred to the subject matter of the sale as a motor vehicle suggests that it was a form contract. If, in addition, the merger clause was nonnegotiable, then the clause was subject to the procedural abuse of oppression.<sup>115</sup>

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108. See text accompanying notes 68-73 *supra*.

109. 20 Wash. App. 361, 581 P.2d 1352 (1978), *petition for review denied*, 91 Wash. 2d 1004 (1978).

110. *Id.* at 365-66, 581 P.2d at 1356-57.

111. *Id.* at 367, 581 P.2d at 1357.

112. The offending sentence provided: "I hereby certify that no credit has been extended to me for the purchase of this *motor vehicle* except as appears in writing on the face of this agreement." *Id.* at 368, 581 P.2d at 1357 (emphasis added).

113. *Id.* at 368, 581 P.2d at 1358.

114. It seems unlikely that the use of the words "motor vehicle" would have caused any true confusion. Elsewhere in the purchase order, the subject matter of the sale was identified as "one Garrett Ecologizer," the brand name of the portable sawmill. *Id.* at 367, 581 P.2d at 1357.

115. See *supra* note 47 and accompanying text.

Since the seller asserted the merger clause for the purpose of defeating express warranty claims, it might be concluded that the clause impaired these bargained-for express warranties, a form of substantive abuse.<sup>116</sup> Thus, the *Butcher* court's holding that the merger clause was unconscionable was arguably justified.

D. *Franz Chemical Corp. v. Philadelphia Quartz Co.*

The decision of the unconscionability issue in *Franz Chemical Corp. v. Philadelphia Quartz Co.*<sup>117</sup> was still more cryptic. There, plaintiff sued defendant for damages resulting when a protective ship hull coating which had been purchased from defendant and resold to a third party cracked and failed to adhere properly. The lower court granted summary judgment for defendant, relying on a sales order acknowledgment form and warranty which limited plaintiff's remedy for breach to replacement of the goods. The lower court also held that a patent licensing agreement, whereby defendant licensed plaintiff to sell its protective coating, was merely an agreement by defendant not to sue plaintiff for infringement of intellectual property rights, and was not part of the contract for sale so as to nullify the limitation of remedy.<sup>118</sup>

On appeal, plaintiff argued that the lower court erred in finding that there was a bare licensing agreement as a matter of law, since evidence of additional terms raised factual issues as to what the parties intended to include in the license agreement. The Fifth Circuit Court of Appeals rejected this contention and affirmed the grant of summary judgment. The license agreement, it noted, included a merger clause, indicating intent to completely integrate the agreement. Therefore, the parol evidence rule precluded consideration of any evidence of consistent additional terms.<sup>119</sup> In passing, the *Franz* court summarily rejected the possibility that the merger clause was unconscionable, stating: "we can find no indication that the merger clause should be deemed unconscionable under U.C.C. 2-302."<sup>120</sup>

The *Franz* opinion did not provide sufficient facts to allow analysis under the conceptual framework adopted in this article. The court did not indicate whether indicia of oppression, such as inequality of bargaining power<sup>121</sup> or the use of a form contract containing nonnegotiable terms,<sup>122</sup> were present. Nor did the court mention any facts which would allow a determination of whether the merger clause was unfairly surprising.<sup>123</sup> Given that both procedural and substantive abuses must

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116. See *supra* note 38 and accompanying text.

117. 594 F.2d 146 (5th Cir. 1979).

118. *Id.* at 148.

119. *Id.* at 149.

120. *Id.*

121. See *supra* note 46 and accompanying text.

122. See *supra* note 47 and accompanying text.

123. In another section of its opinion dealing with the unconscionability of the remedy limitation, the *Franz* court noted that the president of the plaintiff corporation was an experienced businessman. *Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146, 149 (5th Cir. 1979). Lack of education or business experience is a factor which might make it

be present to justify a holding of unconscionability,<sup>124</sup> the inability to resolve these procedural issues dooms any attempt to resolve the broader unconscionability issue.

### CONCLUSION

As a theoretical matter, the commentators' suggestion that a merger clause may be unconscionable is well founded. Both procedural and substantive abuses must generally be present before a term may be held unconscionable. A merger clause, like any other term, may be obtained through a flawed bargaining process, so that it is subject to the procedural abuses of oppression or unfair surprise. Moreover, even though a merger clause does not violate public policy and is unlikely to lack commercial justification, it may be subject to other substantive abuses. The effect of the merger clause under the parol evidence rule is to exclude evidence of consistent additional terms. Therefore, a nonbargained merger clause may impair bargained-for terms of the agreement. Likewise, an unfairly surprising merger clause may violate the surprised party's reasonable expectations.

As a practical matter, the very existence of the four merger clause cases discussed in this article indicates that some lawyers and judges have accepted the suggestion that a merger clause may be unconscionable. That there are only four such cases indicates at the same time that the concept has not yet gained wide currency in the legal community. As application of the adopted conceptual framework to the opening hypothetical demonstrated, a merger clause in a standardized form contract is vulnerable to an unconscionability challenge. Given the frequency with which merger clauses appear in form contracts, counsel for non-drafting contracting parties are presented with abundant opportunities for bringing successful unconscionability challenges. It seems odd that these opportunities have not been more vigorously pursued.

Moreover, the courts which have considered the unconscionability of a merger clause have generally failed to render a complete analysis of the issue. For example, the *Seibel* court ignored the general requirement that both procedural and substantive abuses must be present when it held a merger clause unconscionable on procedural grounds alone. Worse yet, the *Butcher* and *Franz* courts decided the unconscionability issue in a conclusory fashion, without discussing either procedural or substantive abuses. Unconscionability doctrine is powerful stuff; it should not be used, as in the *Butcher* case, to strike down a merger clause without a full explanation of its applicability. Nor is it appropriate to reject an unconscionability challenge summarily, as the *Franz* court did. In so doing, these courts left future lawyers and their clients mystified as to the circumstances under which a merger clause will be held invalid.

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more likely that a party was unfairly surprised by a particular term. See *supra* note 49 and accompanying text. However, business experience, in and of itself, is insufficient to prove the absence of unfair surprise.

124. See *supra* note 56 and accompanying text.

There is a possible explanation for both the paucity of cases involving unconscionability challenges to merger clauses, and the courts' tendency towards incomplete legal analysis of those challenges brought. Despite occasional scholarly suggestions that a merger clause could be attacked for unconscionability, a fuller, more carefully reasoned analysis of the clause's potential for unconscionability was lacking, until now. It is hoped this article, by explaining the circumstances under which a merger clause may be unconscionable, will encourage practitioners to bring more unconscionability challenges to merger clauses and guide courts in deciding those challenges.